

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Comprehensive Review of Universal Service Fund)	WC Docket No. 05-195
Management, Administration, and Oversight)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
)	
Rural Health Care Support Mechanism)	WC Docket No. 02-60
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Changes to the Board of Directors for the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

REPLY COMMENTS OF IDT TELECOM, INC.

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SUMMARY

In these comments, IDT Telecom, Inc. (“IDT”) addresses significant issues involving the contributor audit process, application of the Single Audit Act (“SAA”) to contributor audits and proposed changes to the Commission’s record retention policy. Specifically, responding to comments by both USAC and the FCC’s Office of Inspector General (“OIG”), IDT believes the major problem with the contributor audit process is the lack of Commission oversight and transparency in the overall process. IDT is also opposed to the expansion of USAC’s authority to obtain potentially irrelevant documents and impose penalties on carriers based on USAC’s perception of whether a carrier is cooperating with an audit. IDT also believes that the SAA does not provide statutory authority for OIG to conduct USF contributor audits. Finally, IDT opposes USAC’s proposed increase of the record retention period from three to five years, but believes that if the Commission decides to expand this requirement, it should be phased in over a period of two years so that carriers will not be penalized for complying with existing regulations by retaining records for only three years. IDT also reiterates that the record retention period serves as a *de facto* limit on audits.

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IDT Telecom, Inc. (“IDT”), by its undersigned counsel, submits its reply comments in the above-referenced dockets. In particular, IDT responds to comments from the Universal Service Administrative Company (“USAC”) and the FCC’s Office of Inspector General (“OIG”) relating to the scope, limitations and effectiveness of USAC’s audit procedures and related document retention requirements. In particular, IDT notes that neither commenter addresses the primary problems with USAC’s existing contributor audit process, namely a lack of transparency and oversight. To the contrary, adoption of USAC’s proposals would exacerbate existing problems with the administration of the Universal Service Fund (“USF”), by granting USAC a variety of new powers that could

magnify, rather than alleviate, the ongoing concerns with the administration of the USF. Second, IDT responds to claims by both USAC and OIG regarding the application of the Single Audit Act to USF contributor audits. Finally, IDT reiterates its position concerning any potential change in the existing document retention policy.

I. The Contributor Audit Process Requires Greater Transparency and Oversight, Not The Creation of Additional Powers for USAC.

A. Increased Transparency and Oversight Is Necessary

Both USAC's and OIG's comments¹ note a common problem - the lack of Commission oversight - with the contributor audit process but fail to address the issue. IDT continues to believe that the vast majority of concerns with the USAC audit process are due to the lack of Commission oversight and the equally troubling lack of transparency in the process. USAC's comments, while thoughtful, focus on encouraging the Commission to create greater authority for USAC to demand records, penalize contributors and otherwise act without Commission oversight. These recommendations are precisely the opposite of the changes that are necessary to resolve current concerns with USAC administration.

IDT agrees with OIG's observation that providing FCC guidance on policy and procedure issues for audits is increasingly complicated and time-consuming.² In fact, as IDT noted in its Initial Comments, increasing Commission supervision of USAC,

¹ The OIG comments address two key areas. First, OIG addresses the scope of the comments requested by the Commission. Second, as a result of OIG's involvement in USF oversight, its comments address the overall management, administration and oversight of the USF. The USAC comments address effectiveness and efficiency of USF administration and includes comments on the High Cost Program, USF contributions process and USF disbursements. Finally, USAC addresses USF oversight and offers comments on the audit process and record retention requirements.

² Comments of Office of Inspector General ("OIG Comments"), WCB Docket 05-195, filed October 18, 2005, at 3.

especially public supervision of USAC, should be a fundamental part of this rulemaking.³ OIG's further concern, that oversight by the Commission is so time-consuming as to lack effectiveness, is shared by IDT. This lack of oversight implies that significant portions of USAC's audit process were created by USAC without Commission supervision. While USAC can exercise some discretion in addressing routine administrative matters, the breadth of USAC's decisions, apparently made without formal Commission action or publicly-available guidance, has effectively allowed USAC to create policy.⁴

This lack of formal and public guidance leaves USAC virtually unchecked in its actions. USAC should be required to seek formal approval and guidance from the Commission when establishing audit and other internal procedures. Such a requirement would create transparency in USF administration, which has been lacking in the administration of the system. Whether this lack of transparency is due primarily to a lack of formal Commission guidance, USAC consciously exceeding its authority, or operational necessity is unclear. Regardless of the cause, the result is that USAC's audit process effectively creates policy without Commission oversight. The solution, however, is not to increase USAC's authority, but rather, to increase Commission oversight.

B. USAC Should Not Be Given Increased Authority to Obtain Documents or Impose Penalties on Carriers.

In a similar request for an expansion of its authority, USAC has proposed that it be given greater authority to obtain carrier records to assist USAC in audits.⁵ While IDT certainly agrees that USAC is presently, and should remain, entitled to review records

³ Comments of IDT Telecom, Inc. ("IDT Initial Comments"), WCB Docket 05-195, filed October 18, 2005, at 13.

⁴ IDT Initial Comments, at 3.

⁵ Comments of Universal Service Administrative Company ("USAC Comments"), WC Docket 05-195, filed October 18, 2005, at 220.

relevant to auditing the revenue reported on a Form 499-A,⁶ IDT is concerned that increased authority could lead to abuses. USAC has requested that the Commission provide specific direction on the records that must be retained. IDT believes that approving such a request, where the Commission and USAC can direct a carrier to generate and maintain records that it may not otherwise use in its ordinary course of accounting or directly relevant to the Form 499-A, will create burdens on carriers that are not justified given the marginal increase in certainty this change may provide to USAC. Rather, IDT believes the existing rule, requiring carriers to maintain the records relevant to justify the Form 499-A reporting, is sufficient to permit USAC to complete its audits, without unduly burdening carriers.⁷

If, however, the Commission decides to create such additional, specific requirements, IDT again believes greater transparency is necessary. USAC should be required to define the proposed documents to be covered under this retention policy (or creation policy, if the documents are not otherwise maintained by a carrier in its normal course of business) before the Commission. This documentation is particularly important, as information requested by USAC may or may not be information a carrier otherwise retains in the normal course of business. For instance, the Form 499-A instructions presently request that a carrier report calling card revenue based on face value of the card. Further, beginning in 2005, the Form 499-A requested that carriers report based on “activation” of cards rather than usage. The two instructions are contrary to Generally Accepted Accounting Principles (“GAAP”) and thus not used by IDT in its

⁶ See 47 C.F.R. § 54.707

⁷ In addition, given the wide variance in the size and sophistication of carriers that submit Form 499s, the flexibility contained in the current policy is almost required to be administratively feasible to implement.

normal accounting or in its reports to the Securities and Exchange Commission (“SEC”). As such, IDT would make its calling card reports for Form 499-A purposes in a manner separate from GAAP and SEC reporting, which constitutes a significant burden on the Company. As documents inconsistent with GAAP and SEC requirements have no other use for IDT, except to satisfy USAC, the burden of specifically identifying—in advance—must fall to USAC in the preparation of a specific list. This list should be placed on public notice and subject to comment, and finally, only put into effect after a Commission order approving it. Similarly, any changes to the list would need to be approved by a notice and comment period, and subject to Commission approval.

Perhaps USAC’s most troubling suggestion is that it be permitted to impose penalties for non-cooperation with audits. It is not clear that such a remedy is necessary to address the very concerns that USAC identifies as critical in the audit process. Elsewhere in its comments, USAC states that the primary issue in contributor audits is carriers not complying with FCC rules and the instructions on the Form 499-A.⁸ In addition to there being no need for the changes USAC requests, the creation of such unilateral and unchecked authority is unnecessary and unwarranted for numerous reasons. First, as is highlighted above, there is simply not enough transparency in the audit process. As a result, the audit may involve a USAC request that the carrier create *new* documents as part of the audit. A carrier may or may not have the resources to create these documents on USAC’s timetable, or at all. Second, USAC’s audit procedures are haphazard. USAC may spend months auditing a company before issuing a report. This

⁸ USAC Comments, at 220. As noted by USAC and IDT in the first round of comments, such alleged non-compliance may be due to inaccurate or contradictory Form 499-A instructions. IDT Initial Comments, at 8. This problem has also been noted by USAC in its comments, USAC Comments, at 220, n. 407. IDT suggests that carriers, as a general matter, use their best efforts to comply with instructions.

report may or may not be accurate both in terms of application of the law, and in terms of calculating any USF contributions or refunds due. USAC's auditors routinely send these reports to carriers and request that carriers submit comments in a short time frame, usually in one week, and perhaps as little as five business days. Not surprisingly, carriers may find providing a complete and accurate response in that time frame difficult, if not impossible, depending on the size of, and the magnitude of any errors in, the audit report.

USAC has sufficient power now to encourage cooperation in accordance with the rules, by referring any carrier it believes to be non-cooperative to the Commission for possible enforcement. It is not appropriate to enable USAC to itself have the ability to determine if a carrier is non-cooperative. Power to make such a determination should not be USAC's, but rather the Commission's, as a neutral arbiter, who can independently investigate any allegations from USAC.

In sum, because USAC's audit procedures are not subject to formal and public scrutiny and Commission approval, a carrier may not know what is expected of it before an audit begins, and may not be in a position to generate new documents to satisfy the auditors' demands, respond to every USAC inquiry immediately, or review an audit report and provide complete comments within USAC's arbitrary, self-imposed time table. IDT believes that the current requirement that carriers cooperate generally with USAC in the audit is sufficient.⁹ It is not necessary for the Commission to grant USAC more authority in this context and impose penalties on those who may be cooperating with USAC generally, but who disagree with USAC on the relevance or legality of a request from USAC's auditors. Nor is it appropriate for the Commission to grant the auditor the

⁹ See 47 C.F.R. § 54.711

authority to sanction non-cooperating carriers; the Commission should reserve such authority for itself as a neutral decision maker. If, however, the Commission chooses to create such penalties, then it must do so only after specifying precisely what constitutes “cooperation” with a USAC audit through notice and comment of specific, proposed rules.¹⁰

II. The Single Audit Act Does Not Apply to Contributor Audits.

There is also some confusion as to the application of the Single Audit Act (“SAA”) to USF contributor audits. OIG states that it possesses unlimited audit authority under the Single Audit Act and that any limitation on audits violates this mandate.¹¹ While it may be true that OIG has audit authority over USF, this authority should be limited to any possible audit by OIG of the fund as a whole, or investigations of fraudulent behavior by recipients, as has been the involvement of OIG thus far.¹² OIG’s authority and experience does not extend to audits of individual contributors. OIG has neither the resources nor the expertise necessary for such detailed contributor audits.¹³ USAC’s audit process, while flawed in many ways, is better suited for such detailed audits. OIG’s role should be reserved to overall audits of the fund, including USAC’s operations. Such reviews are consistent with OIG’s more supervisory role in the USAC process.

Moreover, OIG’s claim that the SAA prohibits any limitation on audits is operationally impossible, as some finality is necessary for carriers over the passage of

¹⁰ Such a delineation of what constitutes minimum cooperation, will, in practice, likely also define the limits of carrier cooperation, which is yet another reason not to disturb the existing open-ended cooperation requirement.

¹¹ OIG Comments, at 5.

¹² See e.g., The Federal Communications Commission, Office Of The Inspector General, Semiannual Report To Congress, April 1, 2005 - September 30, 2005, at 3 -7.

¹³ *Id.* (Noting OIG’s resources constraints, with a lack of resources, including an insufficient numbers of auditors, being “the primary obstacle” to OIG’s oversight.)

time and the expiration of a record retention period. As detailed in IDT's Initial Comments, the Commission has already established numerous record retention requirements related to USF (three years for contributors and five years for E-rate participants).¹⁴ These record retention requirements operate as *de facto*, if not *de jure* limitations on conducting audits.¹⁵ Beyond these record retention periods, attempts to audit a carrier's reporting and/or contributions to or receipts from the USF system are likely to be incomplete or inaccurate, if not outright impossible. The Commission should reiterate in this rulemaking that the existing record retention guidelines legally limit USAC's audit authority. To the extent that the Commission uses this rulemaking to expand USAC's (or OIG's) audit authority with respect to carriers, it should clarify that such an expansion shall be phased in over a period of years, to allow carriers an opportunity to improve or expand their record retention without being prejudiced in an audit merely for following the Commission's existing record retention requirements.

Further, the SAA may not be valid as applied to USF at all. The Commission, under the authority granted to it under Section 254 of the Telecommunications Act, was granted the authority to create rules to administer the USF, which, in lawfully doing, the Commission established audit controls through USAC. The SAA, on the other hand, creates general audit guidelines for federal agencies. In this instance, the two statutes, as implemented (by the Commission and the Office of Management and Budget ("OMB"), respectively), may be in conflict. Under principles of statutory interpretation, to the extent that the FCC rules were adopted pursuant to the Telecommunications Act and after the passage of the SAA by Congress, then the statute last in time prevails. The latter

¹⁴ IDT Initial Comments, at 13.

¹⁵ *Id.*

statute, in this case the Telecommunications Act, is presumed to be the most recent expression of the legislature's will, as Congress drafts new legislation with full knowledge of the existing law.¹⁶ Thus, as the SAA predates Section 254 and the Telecommunications Act, it is clear that Congress intended the Commission, and not OMB, to hold the authority to limit or otherwise proscribe audits of USF.

As USAC recognized in its comments on the SAA, the SAA was designed to “minimize the burden placed on entities receiving federal funds.”¹⁷ Thus, the SAA does not grant OIG audit authority with regards to *contributor* audits. Contributors do not, by definition, receive funds from USF; rather, they submit money the USF uses to redistribute to fund recipients. As noted by USAC, the implementation of the SAA by OMB effectively concedes this point.¹⁸ Under OMB guidance, the sanction for failing to comply with any audit requirements under the SAA is the withholding of the applicable federal money. It is thus common sense that any application of the SAA to the USF context is limited solely to beneficiary audits (e.g., E-rate or Low Income audits). Consequently, the SAA does not provide any support for either position that contributor audits cannot be limited or that OIG has authority to conduct contributor audits.

¹⁶ *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996).

¹⁷ USAC Comments, at 223; *See* Single Audit Act of 1984, Pub. L. No. 98-502, 98 Stat 2327, as amended by the Single Audit Act Amendments of 1996, Pub. L. No. 104-156, 110 Stat 1396, codified at 31 U.S.C. §§ 7501 et seq. (“*Single Audit Act*”).

¹⁸ USAC Comments, at 223 - 224.

III. The Record Retention Period Should Remain at Three Years For Contributors.

USAC also proposes to increase the period a carrier is required to retain records supporting its Form 499-A filings from three to five years, to assist USAC in auditing beyond the current record retention period. IDT reiterates that the existing three year record retention program is sufficient time for USAC to initiate and complete audits, and that this existing record retention requirement acts as a *de facto* limit on USAC's audit authority.¹⁹ No other commenter requested that the Commission extend the record retention period and/or increase the number of years subject to audit. In fact, commenters have proposed reducing the record retention and audit period from three years to two years.²⁰ While IDT does not necessarily believe that shortening the period is necessary, IDT agrees that the period during which a carrier may be audited must be limited to the record retention period. If records are not required to be retained, USAC and the Commission should be prohibited from taking any action, be it audit or otherwise, after this period has expired.

To the extent that the Commission decides to expand the record retention requirement, it must phase this change in over a period of two years, so that carriers who may have already purged records beyond the current three year period will not be penalized for complying with the existing regulations. Similarly, the Commission should make clear that contributor audits are limited to the length of the record retention requirements, presently, and going forward.²¹

¹⁹ See, section II, *supra*.

²⁰ Comments of Dobson Cellular Systems and American Cellular Corporation, WC Docket 05-195, filed October 18, 2005, at 19.

²¹ IDT Initial Comments, at 13 - 14.

IV. Conclusion

IDT supports the Commission's ongoing review of USF administration and encourages the Commission to make the changes outlined in IDT's Initial Comments and these Reply Comments in order to foster greater transparency in USF administration and oversight by the Commission.

Respectfully submitted,



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